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IN THE

Supreme Court of the United States

October Term, 1968

No. 261

IN THE MATTER OF THE APPLICATION

OF

STANLEY M. KLEBANOFF, an Attorney,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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POINT I

The arguments raised by petitioner in the instant petition are timely raised.

Respondent alleges that being the constitutional issue was not raised before the trial court,[1] then when petitioner raised these constitutional questions before the Court of Appeals,[2] for the first time, these constitutional questions were not timely raised.

[1] In the instant matter the Appellate Division sat as the trial court, it being the Court of original jurisdiction.

[2] In the instant matter the Court of Appeals sat as the first appellate court.

There was no waiver of petitioner's constitutional rights against self-incrimination. A waiver must be a knowing and intelligent choice to proceed *Gideon* v. *Wainright,* 372 U. S. 335; *Cornley* v. *Cochran,* 369 U. S. 506 and how could petitioner waive such right when his free choice had been taken from him under the former law embodied in *Cohen* v. *Hurley,* 366 U. S. 117.

This court has in many cases held that when an appellant could not reasonably have anticipated a new construction placed on a law, then the appellant could not be charged with having failed to raise the question at an earlier stage: *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 677-8; *Hernon* v. *Georgia,* 295 U. S. 441; *Saunders* v. *Shaw,* 244 U. S. 317, 320; *Dahnke-Walker Milling Co.* v. *Bonduvant,* 257 U. S. 282; *Whitney* v. *California,* 270 U. S. 357, 360; *Raley* v. *Ohio,* 360 U. S. 423, 434-6. In *Johnson* v. *Zerbst,* 304 U. S. 458, the court held that every possible presumption against a waiver of a constitutional right must be indulged.

Here, Klebanoff, just as Haber, could not possibly have anticipated a reversal of the *Cohen* v. *Hurley* case and his objection to his disclosures made under compulsion would have been a futility.

This Court has recently decided this issue by its decision in *Zukerman and Haber* v. *Greason,* 386 U. S. 15, a disciplinary proceeding instituted in New York where both Zukerman and Haber were caused to testify while *Cohen* v. *Hurley* was still the law. Zukerman raised the constitutional question of self-incrimination during the initial hearing but Haber did not. At that time, as in the instant matter, it could not be anticipated that *Cohen* v. *Hurley* would be over-ruled and a new construction placed on the law. This court not only remanded the Zuckerman matter, wherein the constitutional question had previously been raised, but

also the Haber matter, where the constitutional question had not previously been raised.

Respondent's allegations that it was petitioner's theory of his case to cooperate so a less severe punishment would be meted out herein is not justified. For an attorney to believe that as an inducement to pleading guilty to charges of professional misconduct and cooperating, the Appellate Division would be more lenient with him is repugnant to our system of justice. Let the punishment fit the crime and let no inducement or promise be made to influence a party to enter a guilty plea and cooperate. These latter theories are basic to our judicial code and known to every attorney. This petitioner cooperated in his self destruction under the compulsion of the existing law of the land, *Cohen* v. *Hurley,* and no other reason and it would have been almost impossible for the respondent to prove most of these charges without the admissions of petitioner.

POINT II

Petitioner was not afforded procedural due process.

Respondent still clings to the theory that a disciplinary proceeding is not criminal in nature and therefore said petitioner is not entitled to certain constitutional guarantees. This theory is directly in conflict with the recent ruling handed down by this court in *In re Ruffalo,* 390 U. S. 544; 88 S. Ct. 1222 wherein it is stated that:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall, 333, 380, 18 L. Ed. 366; *Spevack* v. *Klein,* 385 U. S. 511, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574"

It further stated therein that disciplinary proceedings are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault,* 387 U. S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed 2d 527.

And still further pointed out that this petitioner was not afforded proceedural due process during the entire underlying investigation and hearings of his conduct as an attorney. It stated:

> "The charge must be known before the proceedings commence."
>
> "They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused."

In the instant matter, petitioner under compulsion of *Cohen* v. *Hurley,* 366 U. S. 117, was forced to testify on three occasions under oath, prior to any charge being brought against him although he was under investigation for certain alleged misconduct gleaned from The Grand Jury Investigation. He was brought in and questioned generally, not only as to those matters under investigation, but, as is the general procedure in The First Judicial District of the Supreme Court of the State of New York, as to a general fishing expedition into petitioners practice, questions that may result and, in the instant matter, did result in further charges being brought against this petitioner,[3] charges of which the respondent would not have been aware of without the testimony of petitioner.

If it is a violation of procedural due process to amend charges brought against an attorney in a disciplinary proceeding based upon said attorney's testimony and to incorporate charges gleaned from such testimony, then, as here,

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[3] Charge 6, co-mingling of funds (see Petition, p. 21).

it is a violation of procedural due process to have this petitioner testify under oath, while under investigation, without any charges brought against him, and based upon said testimony, and only after same, to then bring charges against this petitioner. As stated in *In re Ruffalo*:

> "The charge must be known before the proceedings commence. * * * This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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